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Hazardous Waste Permitting and Enforcement: Legislative Overhaul of California Hazardous Waste Program Expected in 2017; Modernization, Streamlining Needed

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The federal Resource Conservation and Recovery Act (RCRA) of 1976 is the primary law governing the disposal and treatment of hazardous waste. RCRA is a comprehensive "cradle to grave" regulation that imposes stringent recordkeeping and reporting requirements on generators, transporters and operators of treatment, storage and disposal facilities handling hazardous waste. Federal law allows the U.S. Environmental Protection Agency (EPA) to delegate this program to states to manage and administer. State programs must be at least as stringent as federal law. They can be stricter, and California's program is stricter.

The California Department of Toxic Substances Control (DTSC) has administered the federal RCRA program in California since 1982. In 1982, the California Legislature declared that "it is in the best interest of the health and safety of the people of the State of California for the state to obtain and maintain authorization to administer a state hazardous waste program in lieu of the federal program… pursuant to the Resource Conservation and Recovery Act of 1976." Indeed, Congress designed RCRA so that it could be administered by the states because states are closer to, and more familiar with, the regulated community. For these reasons, states are in a better position to administer the RCRA hazardous waste program and respond to local needs.

Most California hazardous waste regulations are very similar to federal RCRA regulations. In many circumstances, however, the California regulations are more stringent or broader in scope than federal regulations. For example, in California, certain wastes beyond RCRA's scope are nonetheless considered hazardous and therefore subject to California's hazardous waste regulations. These wastes are called "non-RCRA" or "California-only" hazardous wastes. By way of example, approximately 85% of the waste deposited at one of the largest hazardous waste facilities in California is treated as California-only waste. If the waste leaves the state, however, it is treated as nonhazardous. For this reason, treating and disposing of hazardous waste in California is more protective of the environment because California's protocols are more rigorous compared to federal RCRA regulations and those of other states.

There are 117 permitted operating hazardous waste facilities in California, including 28 post-closure facilities (closed and going through final remediation) that provide for the treatment, storage or disposal of substances regulated as hazardous waste under federal and state law. A total of 1.82 billion pounds of California hazardous waste was disposed of in these facilities in 2012. Of this total, 62% was treated to the point where it no longer met toxic standards, and 38% was placed in landfills.

Hazardous Waste Permit Process

Anyone in California who owns or operates a facility where hazardous waste is treated, stored (for more than 90 days) or disposed of is required to obtain a hazardous waste permit. There are two parts to a hazardous waste permit application:

- The **Part A** application defines the processes to be used for treatment, storage, and disposal of hazardous wastes, the design capacity of such processes, and the specific hazardous wastes to be handled at a facility.
- The **Part B** application contains detailed, site-specific information, and typically takes longer to complete due to the iterative nature of the application process. The iterative nature of the Part B application process is important because it allows the permit applicant to address any deficiencies in the application or conduct additional studies as may be required.

The permit process begins when an applicant submits a Part A permit application. Less commonly, DTSC also can "call in" a Part A application. Within 30 days of receiving the application, DTSC must make a "Completeness Determination," a finding whether the application has all the required parts. If the application is incomplete, DTSC issues a "Notice of Deficiency."

Once the application is deemed complete, DTSC begins its detailed, in-depth Technical Review (Part B), which evaluates facility operations for compliance with detailed technical standards. The Technical Review often results in a request for additional information. This often leads to an amended application being resubmitted to meet these standards, sometimes repeatedly. After DTSC accepts the application as technically complete, the applicant is notified in writing. DTSC then prepares a draft permit and begins a 45-day public comment period.

A Full Permit decision is subject to compliance under the California Environmental Quality Act (CEQA). CEQA analyses and documents must be completed before the public comment period for the draft permit. Generally, the public comment periods for

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the CEQA document and the draft permit are conducted concurrently. During the public comment period, DTSC generally holds a public hearing at a location near the facility. After the close of the public comment period, DTSC issues a final permit decision accompanied by a written response to all public comments received. The applicant and the public have 30 days to appeal DTSC's decision. Appeals must be limited in scope to comments submitted to the agency on the findings in the final permit. Comments related to CEQA compliance are considered only during the public comment period on the draft permit.

DTSC's 'Fixing the Foundation' Initiative

In early 2012, DTSC launched the "Fixing the Foundation" initiative to address issues that threatened the agency's ability to achieve its RCRA mission and to ensure accountability to the public. As part of the initiative, in early 2013 DTSC contracted with an independent consulting firm to conduct a comprehensive report of DTSC's existing permitting program. The consultant was tasked with developing a standardized process for issuing hazardous waste permits. The purpose of the report was to address concerns raised by certain stakeholders about the cost and length of time in issuing permit decisions. There also was a perception that DTSC may not adequately address community concerns when evaluating RCRA hazardous waste permits.

The final report, *Department of Toxic Substances Control Permitting Process Review and Analysis*, was issued on October 2, 2013. The report made several findings, including the following:

- Process is Too Slow. Permitting decisions are not made on a timely basis, and lengthy and preventable delays occur due to a lack of standard process and a failure to include all processing requirements in a predictable, standard order that is identified and shared with permitting staff;
- Causes of Delay. Permitting delays are due to agency staff reductions and poor management practices;
- Application Process Not Well Understood. Although many aspects of the work process required for a permit renewal are well-defined and well-known, most of the difficult or complex steps are not well understood by the regulated community; and
- Lack of Objective Criteria. There are no clear, objective criteria for denying or revoking a permit based on valid standards of performance and actual threats to public health or the environment.

The report made 17 recommendations to address the above findings. DTSC has responded with a list of tasks and timelines for implementation. All the tasks can be and currently are being implemented on the regulatory level; changes to the law are not necessarily required to address the deficiencies the report identified.

Permitting Enhancement Work Plan

In response to the report, DTSC released a Permitting Enhancement Work Plan (PEWP) in 2014. According to DTSC, the PEWP is a "comprehensive roadmap to guide efforts to improve [DTSC's] ability to issue protective, timely and enforceable permits using more transparent standards and consistent procedures." DTSC notes that the PEWP "provides a critical link to help DTSC move forward and modernize its permitting process."

The PEWP is the second part of a three-part plan that DTSC has identified to address certain deficiencies in its administrative and technical practices. The PEWP incorporates the report's goals, and also includes the basis for selecting each goal, an outline of strategies and desired outcomes, and specific deliverables needed to achieve each goal.

The 10 goals, which were scheduled to be achieved within a two-year timeframe but which nonetheless continue to be developed, are as follows:

1. Shorter Process. Define processes that will reduce permit processing times whenever feasible while maintaining quality and protectiveness;
2. Metrics. Establish clear permitting performance metrics;
3. Standardized Review. Standardize the technical review process materials and vocabulary used to review, approve or deny applications or permit modifications;
4. Coordination. Coordinate intradepartmental support during the permitting process;
5. Public Protection. Update permitting standards to increase protections for human health and the environment;
6. Enforcement. Enhance enforcement;
7. Public Participation. Inform public of progress in processing permits;
8. Environmental Justice. Identify and address environmental justice concerns early in permitting actions;
9. Adequate Staffing. Develop and maintain staff capacity;
10. Data Management. Address data management needs.

In 2014, the Department of Finance requested and the Legislature approved $699,000 and five three-year, limited-term positions to implement the PEWP. Once the PEWP is fully implemented, DTSC has stated that it will identify areas, if necessary, for additional regulatory or legislative changes.

SB 83 and Creation of Independent Review Panel

In 2015, the California Legislature decided that the internal reforms underway at DTSC under the "Fixing the Foundation" initiative were not sufficient. The Legislature and the Governor concluded that third-party oversight of DTSC was needed with the aim of developing independent recommendations to improve DTSC's programs in a number of key areas. SB 83 (Chapter 24, Statutes of 2015), the Public Resources Budget Trailer Bill, established an Independent Review Panel (IRP) within DTSC to review and make recommendations regarding improvements to the department's permitting, enforcement, public outreach, and fiscal management.

Three individuals comprise the IRP: an appointee of the Speaker of the Assembly with scientific experience related to toxic materials; a community representative appointed by the Senate Rules Committee; and a local government management expert appointed by the Governor.

The IRP is required to report to the Governor and the Legislature every 90 days on DTSC's progress in reducing permitting and enforcement backlogs, improving public outreach, and enhancing fiscal management. In addition, the IRP must submit recommendations at the time the Governor submits the annual budget to the Legislature. The IRP has been holding at least one public meeting per month since November 2015. It has submitted six reports to the Legislature and the Governor: two in January 2016, one in April 2016, one in July 2016, one in October 2016, and one in December 2016. Each report contains several recommendations, some requiring legislative authorization. Therefore, the IRP's recommendations, some of which are discussed below, will serve as the basis for legislative action in 2017.

2016 Hazardous Waste Legislation

Although the IRP submitted only its January and April reports during the heart of the 2016 legislative session, the California Legislature nonetheless proposed to hastily reform several different aspects of DTSC's hazardous waste program.

SB 839: Elimination of Flat Fee Option for Hazardous Waste Permit Applicants

Historically, facilities seeking to obtain a hazardous waste permit had two options. They could either pay DTSC a flat statutory fee or enter into a reimbursement agreement where DTSC would be paid by the hour for the staff time spent on processing the application. In an effort to recoup the costs associated with processing RCRA permit applications, DTSC proposed budget trailer language in 2016 to eliminate the flat fee option for applicants and to instead require a reimbursement agreement in all circumstances.

That budget trailer language, labeled a job killer by the California Chamber of Commerce, was later inserted into SB 839 (Committee on Budget and Fiscal Review), the Natural Resources budget bill, which the Legislature passed and the Governor subsequently signed. From CalChamber's perspective, DTSC's proposal is akin to handing DTSC a "blank check" to process permit applications. The view is that this will discourage these facilities from further modernizing and improving their infrastructure by giving DTSC the authority to simply charge whatever it deems fit for purposes of processing a permit application, notwithstanding the DTSC's own self-acknowledged deficiencies that exist within its current permitting program. In addition, there is uncertainty whether DTSC can charge applicants for the agency costs to handle fee disputes—a serious disincentive to questioning the agency's oversight fees. The regulated community is concerned that DTSC's proposal will lead to intractable disputes, add further delays to the permitting process, and impose extraordinary, unjustified, and unpredictable costs on the permit applicant.

The CalChamber and several other organizations proposed a reasonable and good faith viable alternative, which would have ensured that DTSC could recoup a significant amount of its costs directly from the permit application process while also maintaining the transparency, certainty and predictability that hazardous waste permit applicants need. This alternative included: 1) retaining but increasing by 100% the current flat fees; 2) allowing DTSC to enter into a capped reimbursement agreement not to exceed the amount of the new flat fee in instances where a "significant modification" of the permit is required, such as where the application filed is substantially incomplete, or where the application is required to be rewritten in its entirety; and 3) allowing DTSC to impose a secondary flat fee above the initial flat fee in instances where DTSC determines that the applicant has submitted the application in bad faith.

Although several members of the Assembly submitted a letter to Speaker Anthony Rendon (D-Paramount), encouraging him to replace DTSC's proposal with the industry proposal, the industry's proposal was ultimately rejected in favor of DTSC's proposal to eliminate the flat fee option.

SB 654 (de León): New Bureaucratic Layer Will Further Delay Permitting Process

SB 654, introduced by Senator Kevin de León (D-Los Angeles) in 2015, was viewed by industry as creating an unworkable hazardous waste permitting regime that would not address the underlying problems in the current system as identified in the 2013 report. The CalChamber identified SB 654 as a job killer bill.

Under SB 654 as originally introduced, the facility for which a RCRA permit application renewal had been submitted would have automatically been deemed an illegal operation and would have been required to shut down—absent any due process protections—if DTSC failed to take final action on the permit renewal application within 36 months after the expiration of the permit's fixed term. This automatic shut-down if the agency failed to act was viewed as extremely problematic by the regulated community. SB 654 would have shut down facilities even if the permit applicant acted diligently and in good faith throughout the entire permit application process.

Toward the end of the 2015 legislative session, DTSC floated an alternative proposal to replace Senator de León's RCRA permit proposal. Specifically, DTSC proposed to create a new Permit Appeals Board (PAB) at DTSC—similar to those established within certain air districts—to which interested parties may appeal a permit decision by DTSC. CalChamber and a broad industry coalition raised significant concerns with DTSC's proposal, including that it would add yet another bureaucratic layer, thus delaying rather than expediting the permit application process. The CalChamber and coalition also argued that the following were necessary components to the extent the proposal was to move forward:

- The PAB Should Apply to Prolonged Applications Only: Consistent with the original purpose of the bill, the newly established Permit Appeals Board process should be triggered only when DTSC does not render a final decision within 36 months of the permit's fixed term. In such cases, DTSC would be required to establish a schedule, subject to review by the Permit Appeals Board, so that final decisions for such "controversial" permit applications could be rendered more expeditiously.
- DTSC Should Be Required to Implement Regulations Regarding the PAB Process: Most Air Pollution Control District Hearing Board processes are governed by implementing rules. For example, the "Rules and Procedures of the South Coast Air Quality Management District Hearing Board," adopted in June 1997 and most recently revised in November 2014, is nearly 40 pages long, and establishes rules and procedures regarding the following: Definitions, Filing and Service, Form of Filings, Pleadings, Motions, Findings and Decision, Hearing Board Procedures, Discovery and Evidence, Case File and Hearing Calendar, and Officers of the Hearing Board.

Similar rules must be in effect before a PAB is established so that all parties in the permit application process fully understand their rights and responsibilities.

- The PAB Should Apply to Applications Submitted After Implementing Regulations Take Effect: The PAB would require significant regulatory guidance. Without regulatory guidance on a host of evidentiary and process-oriented issues, DTSC, the PAB, hazardous waste facility operators, and the public will not have sufficient guidance to fully understand how this new and complicated process must take its course. Administrative disputes and lawsuits will proliferate, and the process for issuing permits will take far longer, contrary to the author's stated intent. Accordingly, the proposed PAB process should be triggered only for permit applications submitted after final adoption of the implementing regulations, when the parties have the requisite guidance regarding how to proceed.

Although Senator de León never brought SB 654 up for a vote in 2016 and never formally amended SB 654 into DTSC's PAB proposal, the concept has nonetheless been a topic of discussion at IRP meetings. It may be considered again in 2017.

AB 1102 and 1400 (Santiago) and AB 1205 (Gomez): Rushed Legislative Package Fails to Pass Committee

In the last months of the 2016 legislative session, two Democratic Assembly members from Los Angeles, Miguel Santiago and Jimmy Gomez, introduced piecemeal legislation seeking to reform certain aspects of DTSC's hazardous waste program. A brief summary of each bill follows:

- AB 1102 (Santiago; D-Los Angeles): Imposes substantially increased costs on hazardous waste permit applicants by imposing new inspection requirements on DTSC, notwithstanding the fact that DTSC is currently reforming its enforcement program on the regulatory level, including the issue of onsite inspections. The regulated community viewed this approach as premature and unnecessarily burdensome.

- AB 1400 (Santiago; D-Los Angeles): Requires 1) the permit applicant to install fence-line monitoring at its facility as a condition of approval (even though DTSC already has the discretion to require fence-line monitoring and has indeed done so for several facilities), and 2) permits applicants to fund technical assistance grants to maximize public participation. Industry viewed this second requirement as in clear violation of Proposition 26 because the costs imposed on the applicant would not have been "incident to issuing licenses and permits."
- AB 1205 (Gomez; D-Los Angeles): Imposes requirements deemed vague and duplicative by the regulated community by requiring DTSC to hold a public meeting within 90 days of receiving a renewal application for a permit and requiring DTSC to review the financial assurances of permitted facilities at least once every five years.

None of these bills passed muster in the Senate Environmental Quality Committee. The committee analysis characterized the legislation as follows:

> *"It is not clear that a suite of bills that make small 'steps in the right direction' at the 11th hour of the Legislature's policy deadlines at the end of a two-year session is the right direction at this point. This lacks the opportunity to do the thoughtful consideration necessary to review how these reforms impact all stakeholders and may actually hinder significant reform necessary to improve DTSC.*
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> *"It is clear however, that all review to date has pointed to systemic issues at DTSC. At the heart of the criticisms around DTSC's failings is a lack of accountability. These bills, while they may tighten the statute, do not help solve the root problem of greater transparency and accountability."*

Legislative and Regulatory Outlook for 2017

With the establishment of the IRP and the recent enactment of legislation commanding DTSC to take certain actions, CalChamber expects an active legislative and regulatory year for DTSC's hazardous waste program. A few anticipated developments are discussed below.

Structural Reform: Third-Party Oversight/Hearing Committee to Be Topic of Discussion

In addition to the Permit Appeals Board discussed above, the Independent Review Panel also has explored whether to create an oversight board to continue its work. Alternatively, the IRP is exploring whether to create some sort of public participation board so that interested parties have a forum to raise their concerns.

Although a continuing oversight would likely drain DTSC's resources and could prevent the agency from implementing the very reforms that the IRP seeks in a timely manner, CalChamber has expressed support for maximizing public participation through a public participation board. Any type of independent board with quasi-adjudicatory authority, however, like the PAB, would likely cause more delay to an already-prolonged and arduous process. CalChamber anticipates significant discussion in 2017 regarding the creation of some type of independent body.

Billing Procedures: Industry Will Push for Changes to DTSC's Billing Procedures

On November 16, 2016, the IRP held a meeting to discuss, in part, DTSC's billing procedures on RCRA permit applications. Both during testimony and in a written letter, the CalChamber identified several concerns with DTSC's current billing procedures. The CalChamber proposed several measures to improve the billing process, including:

- Establish deadlines by which DTSC must respond to billing disputes;
- Establish deadlines by which meet-and-confers must occur;
- Establish consequences if DTSC fails to comply with preparing cost estimates or fails to issue invoices on a timely basis;
- Provide DTSC project managers with the organizational structure and budget management tools necessary for efficient project management;
- Establish procedures to substantially reduce DTSC's indirect cost rate, which from January to June 2015 was at 169%;
- Establish guidelines to ensure that parties are not billed for the cost associated with resolving fee disputes;
- Require DTSC to provide daily staff time logs as a matter of course with all invoices;
- Require DTSC to change its practices to ensure that interest is not charged for any unpaid amounts subject to a dispute; and
- Require DTSC to provide its staff with a concentrated training program in billing practices and procedures.
- The CalChamber and its coalition will continue to push for these recommendations to be adopted, whether through regulation or legislation, in 2017.

Violation Scoring Procedure: Regulatory Proposal Expected in 2017

In early 2016, DTSC representatives gave a presentation to the CalChamber and other organizations in the business community to review DTSC's plans to propose a Violation Scoring Procedure (VSP) regulation. According to DTSC, the purpose of the VSP is to create clear and objective criteria for making permit denial or revocation decisions that are based on valid standards of performance and risk. Although it is unclear precisely how the process would work in practice, at its core, the VSP process would empower DTSC to 1) identify, within an unknown period of time, Class I violations and Class II violations when those violations are chronic or committed by a recalcitrant violator, 2) assign each violation a score based on the extent of the deviation and potential for harm, characterized in terms of "minor," "moderate," or "major," and 3) total up the scores against an unknown numerical threshold to determine whether to deny or revoke a permit.

The CalChamber submitted a comment to DTSC on its preliminary VSP proposal, asking that DTSC not pursue the proposal. Instead, CalChamber urged the agency to prepare guidelines or regulations to properly implement AB 1075 (Alejo; D-Salinas; Chapter 470, Statutes of 2015). AB 1075 establishes standards for what constitutes a "violation" or "noncompliance" that shows a "repeating or recurring pattern," and further specifies the enforcement or permit revocation action to be taken by DTSC if such repeat or recurring violations occur. Importantly, CalChamber believes that DTSC does not have the statutory authority to move forward with its VSP proposal after the passage of AB 1075, since AB 1075 established the only types of violations or instances of noncompliance that can serve as grounds for denying or revoking a permit.

In addition to the serious questions about DTSC's lack of statutory authority to promulgate the VSP proposal, the VSP concept is extremely problematic for several reasons. First and foremost, the numerical scores upon which the VSP intends to rely cannot possibly serve as clear and objective criteria for making permit denial and revocation decisions; the scores are inherently subjective in nature, even though the VSP attempts to give the appearance of empiricism. To wit, the result of the VSP process would be a numerical value, but such value, using the process DTSC envisions, would be based on nothing more than a cascading series of subjective decisions. The process of evaluating the nature of past violations—especially when viewing how such violations should affect a facility's ability to continue operating—is an extraordinarily complicated, technical and data-driven injury that should not and indeed cannot be distilled to a numerical value.

The CalChamber's comments notwithstanding, DTSC intends to propose a formal VSP regulation in early 2017.

CalChamber Position

The CalChamber supports treating, storing and disposing of hazardous waste in California with protocols that are more rigid than other states in terms of environmental protection and public safety.

Understanding the importance of keeping hazardous waste in California, hazardous waste permits should be issued in a timely manner and subject to clear and predictable procedures. The application procedures also must be flexible because this is an iterative process. Indeed, the iterative nature of the hazardous waste permit process is critical; it allows DTSC to adapt and respond to issues raised by stakeholders and the public during the administrative process, and ultimately ensures that final permits are both protective and defensible.

The CalChamber believes that virtually all of the systemic issues within DTSC stem from a small minority of the 118 DTSC permitted facilities and sites throughout the State of California. Indeed, efforts to reform DTSC, both by way of legislation and through the IRP's recommendations, are driven by approximately 10–15 controversial facilities, but nonetheless unjustifiably would implicate all 118 facilities/sites.

These facilities/sites may be controversial for several different reasons, including the complexity of the underlying permit and environmental review, the size or location of the facility or site, and the degree of public involvement. The controversy merits specialized expertise and attention above and beyond that which is provided for the remaining, more routine and uncontroversial facilities and sites. A complex process should not be created for the vast majority of RCRA hazardous waste facilities where permit issuance should be much more routine.

Accordingly, legislative solutions should be focused on 1) giving DTSC the discretion and the resources to identify the 10–15 facilities and sites for which specialized expertise and attention are needed; 2) establishing a crisis management team devoted to the 10–15 facilities and sites identified by DTSC as requiring specialized expertise and attention (expanding on the IRP's recommendation in its fourth report of October 2016 in which it suggests creating a "crisis management team within the Public Participation Program,"); and 3) committing General Fund expenditures in matters of extraordinary public interest (as determined by DTSC) to adequately respond to public comments and to devote the requisite resources and expertise to complicated permitting processes or cleanups. A portion of these General Fund expenditures can be used for enhanced public

participation and to ensure that local community groups have the resources necessary for full and informed public participations (for example, translation services for communities where English is not a first language).

In conclusion, the hazardous waste laws within the Health and Safety Code are complex and arcane. When new legislative concepts are proposed in any statutory framework, but particularly one as complicated as the hazardous waste laws, they typically are done by accretion. Legislation seldom eliminates provisions of law or harmonizes "new" and "old" provisions. California's hazardous waste laws are in desperate need of modernization. The CalChamber believes that to the extent the Legislature is inclined to pursue DTSC reform legislation, it should proceed with caution to ensure that any new concepts are not duplicative and, where appropriate, the Legislature should eliminate unnecessary, outdated or unduly burdensome provisions.